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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-808

FREZZO BROTHERS, INC.,
GUIDO FREZZO and JAMES L. FREZZO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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IN THE

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FREZZO BROTHERS, INC.
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Frezzo Brothers, Inc., Guido Frezzo and James L. Frezzo, respectfully petition this Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on July 13, 1979.

OPINIONS BELOW

The opinion of the District Court is published at *United States of America v. Frezzo Brothers, Inc., et al.*, 461 F. Supp. 266 (E.D.Pa. 1978) and attached as Appendix A. The opinion of the Court of Appeals is published at *United States of America v. Frezzo Brothers, Inc., et al.*, 602 F.2d 1123 (3d Cir. 1979) and attached as Appendix B. By order dated October 22, 1979, the Court of Appeals denied a petition for rehearing, at Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit entered July 13, 1979. The petition for rehearing was denied on October 22, 1979. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Should Not The Indictment In This Criminal Water Pollution Case Have Been Dismissed Where The Administrator Of The EPA Caused The Commencement Of This Criminal Prosecution Without Having Given Notice, By Civil Action Or Other Non-Penal Notification, To Petitioners That They Were In Alleged Violation Of The Federal Water Pollution Control Act Due To Periodic Pollutant Discharges Arising Out Of Their Agricultural Related Activities As To Which There Are No Promulgated Effluent Standards?

STATUTES INVOLVED

Title 33, U.S.C. §1311(a)

§1311. Effluent limitations

(a) Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

Title 33, U.S.C. §1319

§1319. Enforcement

(a)(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a State under an approved permit program under section 1342 or 1344 of this title, he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section . . . .

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section . . .

Civil actions

(b) The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

Criminal penalties

(c)(1) Any person who willfully or negligently violates section 1311, 1312, 1316, 1317, or 1318 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State or in a permit issued under section 1344 of this title by a State, shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both . . .

(3) For the purposes of this subsection, the term "person" shall mean, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

Civil penalties

(d) Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

STATEMENT OF THE CASE

JAMES L. FREZZO, GUIDO FREZZO, and FREZZO BROTHERS, INC. (petitioners), were charged in a six-count indictment with willfully or negligently discharging pollutants in violation of §§301(a) and 309(c) of the Federal Water Pollution Control Act Amendments of 1972 (the "Act"), 33 U.S.C. §§1311(a) and 1319(c).

The case was tried to a jury and the petitioners were convicted on all counts. The natural petitioners were sentenced to thirty-day jail terms and fined a total of $50,000; the corporate defendant was fined the sum of $50,000. Petitioners' conviction was affirmed by the United States Court of Appeals for the Third Circuit. Petitioners' Petition for Rehearing before the original panel was denied and this timely petition for a writ of certiorari has followed.

Guido and James Frezzo are brothers, who own and operate a compost production and mushroom farming facility in rural Southeastern Pennsylvania. Compost is the growing medium for mushrooms and is essentially a mixture of hay and horse manure. To prepare compost, the mixture is piled on concrete platforms and allowed to ferment. The fermentation process is facilitated by the periodic introduction of water during various stages of the composting, which is accomplished by utilization of a water circulation system on the premises. Because the composting operation takes place out of doors, rain and snow will likewise be introduced to the composting operation.

As part of the water circulation system, as well as to contain precipitation runoff, the petitioners constructed a concrete tank in the early 1970's. This tank served the dual purpose of holding water for the recycling system as well as to contain excess runoff during rain and snowfalls.

During the trial of this action, the Government established that on six occasions (corresponding with the dates charged in the six-count indictment), there was a runoff of water from petitioners' property which contained pollutants and which entered a navigable stream. On at least several of these occasions, the runoff was due to unusually heavy rains in the area causing an overflow of the tank; in the remaining occasions, the cause of the runoff was not clearly established.

REASON FOR GRANTING THE WRIT

This Criminal Water Pollution Case Presents An Important, Unsettled Federal Law Issue Of Whether The Administrator Of The EPA Must Give Prior Notice, By Civil Action Or Other Non-Penal Notification, Before Causing The Commencement Of A Criminal Prosecution Against An Alleged Violator Of The Federal Water Pollution Control Act Who Was Engaged In An Agricultural Related Activity As To Which There Are No Promulgated Effluent Standards.

The Federal Water Pollution Control Act 62 Stat. 1155, as amended in 1972, 33 U.S.C.A. §§1251-1376 (Supp. 1973), is a complex statutory enactment designed to reduce, and eventually eliminate, water pollution.

> In §1311(a) it is provided:
> Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this Title, the discharge of any pollutants by any person shall be unlawful.

Section 1311, in subsection (b), sets out a timetable for the promulgation, by the Administrator of the EPA, of effluent limitations for dischargers covered by the Act. The Administrator of the EPA has not promulgated effluent limitations applicable to mushroom farming nor compost production. Petitioners argued in the lower court that the absence of effluent limitations, alone, warranted the dismissal of the indictment in this action, relying upon *United States v. GAF Corporation*, 389 F. Supp. 1379 (S.D. Tex. 1975). That case held that before an abatement order may be issued pursuant to section 1319(a)(3) of the Act, defendants must be shown to have violated an applicable

effluent limitation. Relying upon *American Frozen Food Institute v. Train*, 176 U.S. App. D.C. 105, 113, 539 F.2d 107, 115 (1976), and *United States v. Hamel*, 551 F.2d 107 (6th Cir. 1977), the Court of Appeals in the present case rejected Petitioners' argument suggesting that when no effluent limitations have been established for a particular kind of activity, the proper procedure under the Act is to apply for a permit to discharge pollutants under 33 U.S.C. §1342(a). The Court in *GAF*, however, rejected this argument on the ground, in part, that the orderly implementation of the goals of the Act should properly require the promulgation of standards by the Administrator of the EPA before enforcement action.

The Administrator of the EPA caused the commencement of the instant case by resort to criminal sanctions even though there were no effluent standards applicable to Petitioners and the Administrator had given no prior notice to Petitioners that their periodic discharges might be deemed a violation of the federal statute.

The Court of Appeals in the present case noted that there was "conflicting legislative history" with respect to whether a compliance order or a civil suit by the Administrator should be a prerequisite to the Government's institution of criminal proceedings under §1319(c) (602 F.2d at 1126). The Court of Appeals, as did the District Court, relied upon *United States v. Phelps Dodge*, 391 F. Supp. 1181 (D. Ariz. 1975), which had held that there were no civil prerequisites to the Government's maintenance of criminal proceedings under the Act.

Phelps Dodge, however, did not involve the additional question presented in the instant case, *i.e.*, the absence of promulgated effluent limitations applicable to the alleged discharger.

At 33 U.S.C. §1319(a)(1), it is stated in pertinent part:

> Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation . . . he *shall* proceed under his authority in paragraph (3) of this subsection *or he shall notify* the person in alleged violation . . . . (emphasis added).

This Congressional language sets up two options for the Administrator when he becomes aware of a potential violation. First, he can notify the person of the alleged violation; this was not done in the present case.

His second option is found in subparagraph (3) of the pertinent section which provides:

> Whenever on the basis of any information available to him the Administrator finds that any person is in violation . . . he shall issue an order requiring such person comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section . . . (emphasis added).

Again, no such action proceeded the criminal charges here. The failure of the Administrator in the present case to give such notice, or seek an abatement order to commence a civil action, disabled the Administrator from causing the commencement of the present criminal action.*

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* Some light is shed on the intention of Congress by the language of Senator Muskie in discussing the intent of §309 of the Act (33 U.S.C. §1319).

> In §309, the Senate receded (sic) to the House in not making civil enforcement mandatory upon the Administrator despite the feeling of the Senate Conferees Act, on its own merits, mandatory civil enforcement is far preferable to a discretionary responsibility. It is important to note, however, that the provisions requiring the Administrator to issue an abatement order

It will be recalled that the Court of Appeals in the present case rejected Petitioners' argument that the absence of effluent standards promulgated by the Administrator should be deemed a bar to the commencement of a criminal action; the Court of Appeals rejected this argument on the theory that Petitioners should have applied for a discharge permit, notwithstanding the absence of effluent standards, apparently with the belief that the EPA should fashion an *ad hoc* permit program for an otherwise unregulated activity.

The Court of Appeals did not consider that agricultural activities are *excluded* from the Administrator's permit program by regulations which date back to 1973: See 38 F.R. 18000 (July 5, 1973) (codified at 40 C.F.R. §125.4 (1975)); 41 F.R. 28496 (July 12, 1976) (codified at 40 C.F.R. §125.4 (1978)); see also, *Natural Resources Defense Council, Inc. v. Train,* 396 F. Supp. 1393 (D.D.C. 1975), *aff'd,* 568 F.2d 1369 (D.C. Cir. 1977).

We submit this Court should accept this case for review so that the EPA Administrator's enforcement power may be clarified.

Stiff fines, and more significantly jail sentences, for Petitioners are a drastic way of enforcing this complex statute, particularly where the EPA made no effort to notify Petitioners they were in alleged violation of the Act.

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whenever there is a violation or mandatory in both the Senate Bill and the House Amendment, and the conference agreement contemplates that the Administrator's duty to issue an abatement order remains a mandatory one (a Legislative History of the Water Pollution Control Act Amendments of 1972, p. 174).

A similar view was espoused by Representative Harsha in the House during debate on the House Bill: Legislative History, *id.* at 530.

(Indeed, the absence of effluent standards and presence of an agricultural exclusion from the permit program makes this case a particularly appropriate criminal water pollution case for the Court to review. In *United States v. Pennsylvania Chemical Corporation,* 411 U.S. 655 (1973), this Court observed:

> . . . Although the regulations did not themselves purport to create or define the statutory offense in question, see United States v. Mersky, 361 U.S. 431, 4 L.Ed.2d 423, 80 S. Ct. 459 (1960), it is certainly true that their designated purpose was to guide persons as to the meaning and requirements of the statute. Thus, to the extent that the regulations deprived PICCO of fair warning as to what conduct the Government intended to make criminal, we think there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution. See Newman, Should Official Advice Be Reliable?—Proposals as to Estoppel and Related Doctrines in Administrative Law, 53 Col.L.Rev. 374 (1953); Note, Applying Estoppel Principles in Criminal Cases, 78 Yale LJ 1046 (1969). (411 U.S. at 674)

CONCLUSION

For the foregoing reasons, petitioners pray that the petition for certiorari should be granted and the judgment of the United States Court of Appeals for the Third Circuit reversed and the indictment dismissed.

Respectfully submitted,

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DATED: November 21, 1979

APPENDIX A

DISTRICT COURT DECISION

UNITED STATES DISTRICT COURT

Crim. No. 78-218.

E. D. Pennsylvania.

Nov. 22, 1978.

UNITED STATES of America

vs.

FREZZO BROTHERS, INC., Guido Frezzo, James L. Frezzo.

Jury found defendants guilty of willfully or negligently discharging pollutants in violation of the Federal Water Pollution Control Act Amendments of 1972, and defendants moved for judgment of acquittal or a new trial. The District Court, Raymond J. Broderick, J., held that: (1) issuance of an order or institution of a civil suit by the administrator of the Environmental Protection Agency was not prerequisite to filing of criminal prosecution; (2) where defendants never obtained or applied for a permit, any discharge of pollutants by them would be unlawful even though no effluent standards were applicable to them; (3) evidence was sufficient to support finding of guilt, and (4) language in indictment concerning capacity in which individual defendants committed the crime was surplusage and did not need to be proved, and the jury did not have to be so charged.

Motions denied.

1. Criminal Law–753.2(2)

Contentions that court erred in denying pretrial motion to dismiss indictment should properly have been raised in a motion for arrest of judgment rather than motion for judgment of acquittal or new trial. Fed. Rules Crim. Proc. rule 34, 18 U.S.C.A.

2. Navigable Waters–35

Neither issuance of an order notifying defendants of alleged violations of the Federal Water Pollution Control Act nor institution of a civil suit by administrator of the Environmental Protection Agency was prerequisite to filing a criminal prosecution for willfully or negligently discharging pollutants in violation of the Act. Federal Water Pollution Control Act, §§ 301(a), 309(c) as amended 33 U.S.C.A. §§ 1311(a), 1319(c).

3. Navigable Waters–35

Where defendants never obtained or applied for a permit, any discharge of pollutants by them would be unlawful under the Federal Water Pollution Control Act even though no effluent standards were applicable to them. Federal Water Pollution Control Act, § 301(a) as amended 33 U.S.C.A. § 1311(a).

4. Navigable Waters–35

In prosecution for willfully or negligently discharging pollutants in violation of the Federal Water Pollution Control Act Amendments of 1972, evidence was sufficient to support findings that each of the defendants discharged pollutants willfully or negligently in connection with runoff from compost used in mushroom growing, that individual defendants were owners or corporate officers of the corporate defendant, and that corporate defendant owned the

property and controlled the compost operation. Federal Water Pollution Control Act, §§ 301(a), 309(c), 502(6) as amended 33 U.S.C.A. §§ 1311(a), 1319(c), 1362(6).

5. Criminal Law–494

In prosecution for willfully or negligently discharging pollutants into stream, testimony of expert provided sufficient actual basis for his opinion that condition or pollution of stream was caused by discharge from defendants' property.

6. Criminal Law–673(4)

In prosecution for pollution violations, there was no error in admitting into evidence a certain statement and letter written by one of the defendants subject to instruction that the statement and letter were admissible only as to that defendant, where, in light of other evidence against the other defendants, the statement and letter were not powerfully incriminating or highly damaging to those defendants or of substantial weight in the Government's case against those defendants.

7. Criminal Law–793

Indictment and Information–167

In prosecution for willfully or negligently discharging pollutants in violation of the Federal Water Pollution Control Act, language concerning the capacity in which individual defendants committed the crime, referring to them as co-owners and officers of defendant corporation, was surplusage and did not need to be proved, and thus there was no error in omitting such language in charge to the jury concerning the individual defendants. Federal Water Pollution Control Act, §§ 301(a), 309(c), 502(5) as amended 33 U.S.C.A. §§ 1311(a), 1319(c), 1362(5).

8. Searches and Seizures—7(26)

In prosecution for water pollution violations, defendants lacked standing to object to seizure of samples taken from a channel box which was not located on defendants' property, where there was no evidence that defendants were on the premises at the time of the seizure of the samples, that they had a legitimate proprietary or possessory interest in the premises from which the seizure was made, or that defendants were charged with an offense that includes as an essential element of the offense possession of the samples seized.

Peter F. Vaira, U.S. Atty., Bruce J. Chasan, Asst. U.S. Atty., Eastern District of Pennsylvania, Philadelphia, Pa., Michael P. Carlton, Sp. Atty., Dept. of Justice, Washington, D.C., for plaintiff.

William J. Gallagher, MacElree, Harvey, Gallagher & Kean, Ltd., West Chester, Pa., for defendants.

MEMORANDUM

RAYMOND J. BRODERICK, District Judge.

Defendants, Frezzo Brothers, Inc. (Frezzo Bros.), Guido Frezzo (Guido) and James L. Frezzo (James), were found guilty by a jury on all six counts of an indictment charging them with willfully or negligently discharging pollutants in violation of Sections 301(a) and 309(c) of the Federal Water Pollution Control Act Amendments of 1972 (the Act), 33 U.S.C. §§ 1311(a), 1319(c) (1970 ed. Supp. IV). Defendants have filed a motion for judgment of acquittal. In the alternative, they have moved for a new trial. Oral argument was had on the motions. For the reasons hereinafter set forth, defendants' motions will be denied.

I. *Motion for Judgment of Acquittal.*

[1] In their motion for judgment of acquittal, defendants make the following contentions:

(A) That the Court erred in denying the defendants' pretrial motion to dismiss the indictment for failure of the Administrator of the Environmental Protection Agency (EPA) either to notify the defendants of alleged violations or to institute a civil suit against them, prior to the institution of criminal proceedings;

(B) That the Court erred in denying the defendants' pretrial motion to dismiss the indictment on the ground that there were no effluent standards applicable to defendants;[1] and

(C) That there was insufficient evidence presented to prove that the alleged discharge of pollutants was caused either willfully or negligently by any of the defendants, that any of the defendants discharged the pollutants, that the individual defendants were either owners or corporate officers of Frezzo Bros. at the time of the alleged offenses, and that Frezzo Bros. owned the property in question or operated the holding tank in question at the time of the alleged offenses.

[2] In connection with the defendants' contentions that the issuance of an order or the institution of a civil suit by the Administrator is a prerequisite to the filing of a criminal prosecution, we agree with the decision of the court in *United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181 (D.Ariz.1975), which considered and rejected this same

1. The first two contentions of the defendants should properly have been raised in a motion for arrest of judgment. Fed. R. Crim. P. 34; 2 Wright, *Federal Practice and Procedure:* Criminal §§571-574 (1969). We have considered these contentions as if they were raised in such a motion and deny the motion for the reasons stated herein.

contention. In *Phelps Dodge*, the Court concluded that the Administrator is "not required to proceed first to effect a correction by civil means before instituting criminal proceedings." *Id.* at 1184. Thus, we find that we correctly denied the defendants' motion to dismiss.

[3] In connection with the defendants' contention that the indictment should have been dismissed because of the lack of effluent standards applicable to the defendants, we read Section 301(a) of the Act as clearly prohibiting the discharge of pollutants without a permit by any person, except as in compliance with certain sections of the Act which the defendants do not contend are applicable. 33 U.S.C. §§ 1311(a) (1970 ed., Supp. IV). The defendants acknowledge that they neither have a permit nor have they applied for one. In interpreting Section 301(a) of the Act, the Supreme Court has stated that "it is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms." *EPA v. State Water Resources Control Board*, 426 U.S. 200, 205, 96 S.Ct. 2022, 2025, 48 L.Ed.2d 578 (1976); see *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 7, 96 S.Ct. 1938, 48 L.Ed.2d 434 (1976); *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1374, 186 U.S.App.D.C. 147 (1977) ("the legislative history [of the Act] makes clear that Congress intended the . . . permit to be the only means by which a discharger [of pollutants] . . . may escape the total prohibition of § 301(a)"); *Bethlehem Steel Corp. v. Train*, 544 F.2d 657, 659 (3d Cir.), *cert. denied*, 430 U.S. 975, 97 S.Ct. 1666, 52 L.Ed.2d 369 (1976) ("all discharges of pollutants must be authorized by a permit . . . ."). Because the defendants admit that they never obtained or applied for a permit, any discharge of pollutants by them would be unlawful under Section 301(a), even though no effluent standards are applicable to them. Thus, we correctly denied the defendants' motion to dismiss on the ground that there were no applicable effluent standards.

[4] In connection with defendants' contention that the evidence was insufficient, we find that the evidence produced at trial, viewed in a light most favorable to the Government, *Glasser v. United States*, 315 U.S. 60, 80, 62 S. Ct. 457, 86 L.Ed. 680 (1942); *United States v. Armocida*, 515 F.2d 29, 46 (3d Cir.), *cert. denied*, 423 U.S. 858, 96 S.Ct. 111, 46 L.Ed.2d 84 (1975), is more than sufficient to support the verdict. We summarize it as follows:

The defendants, Guido and James, are President and Secretary, respectively, of the defendant corporation, Frezzo Bros., a family business formed in the 1950's engaged in the growing of mushrooms and the manufacturing of mushroom compost necessary for growing mushrooms. The primary ingredient of mushroom compost is horse manure. The Frezzo Bros. property (the Frezzo property) is located on the east side of Penn Green Road, near Avondale, Chester County, Pennsylvania. A concrete holding tank constructed on the property in 1971 gathers the water runoff from the compost and, by a system of pumps, recirculates the water runoff back onto the compost. In addition, a storm water runoff system separate from the compost operations carries rainwater from the property, under Penn Green Road through a pipe which runs for approximately 200 feet from the Frezzo property into an unnamed tributary of the East Branch of the White Clay Creek. The White Clay Creek crosses the Delaware state line and runs into the Christina River, which in turn runs into the Delaware River. On each of the six dates charged in the indictment, runoff from the compost pile made its way into the storm water runoff system and was carried through the pipe into the tributary of the White Clay Creek. A channel box is located about ten feet west

of the Penn Green Road, across the street from the Frezzo property. By lifting the cover on this channel box, one can observe the drainage from Frezzo Bros.' storm water runoff system as it flows through the pipe toward the White Clay Creek.

The evidence presented by the Government showed that samples of the discharge from the Frezzo property were taken on each of the six dates charged in the indictment, and many of these samples were introduced as exhibits at trial. The testimony and stipulations of various chemists and physical scientists demonstrated that chemical and bacteriological tests were properly conducted on each of the samples and that the discharges were "sewage", inasmuch as the results of the tests showed that the samples contained higher concentrations of pollution-producing chemicals and bacteria than untreated human sewage. In addition, one physical scientist testified that the test results clearly indicated that the discharges contained "biological materials" and that the discharges were also "sewage." "Sewage" and "biological materials" are terms specifically included in the Act's definition of "pollutant." 33 U.S.C. § 1362(6) (1970 ed. Supp. IV).

The Government introduced as exhibits at trial several photographs which showed not only the layout of the Frezzo property, but also the path that runoff from the compost pile would follow in entering the storm water runoff system, through which it would be carried from the Frezzo property through the channel box into the unnamed tributary of the East Branch of the White Clay Creek. One witness testified that he had actually walked along the path of the pipe from Penn Green Road to the pipe's end at the tributary and that there were no other mushroom manufacturers upgrade of the channel box. He further testified that results of analyses of samples from the channel box and from the White Clay Creek substantiated

his conclusion that the pollution in the White Clay Creek came from the Frezzo property. Therefore, his stated opinion was that the pollution of the White Clay Creek was due primarily to the discharge from the Frezzo property. In addition, there was testimony concerning the amount of rainfall in the area and that the holding tank was not large enough to contain normal rainfall.

Testimony was presented by several witnesses that on many occasions, commencing as far back as 1970, the defendants in this case had been investigated, visited and confronted by a number of state and county employees concerning the fact that the stream in question was being polluted by runoff from the compost operation conducted by the defendants on the Frezzo property.

Testimony in connection with the articles of incorporation of Frezzo Bros., which were introduced as an exhibit by the Government, demonstrated that the corporation was incorporated in 1969 under the laws of Pennsylvania and that James and Guido were two of the three original directors. The Government also introduced as an exhibit a deed dated February 2, 1973 which listed Frezzo Bros. as grantor and which contained notarized signatures of Guido as President and James as Secretary. On a visit to the Frezzo property on November 16, 1976, an environmental specialist with the Pennsylvania Department of Environmental Resources (the DER), upon asking to speak to a responsible official of the company, was directed to James. He questioned James concerning a brown-colored liquid flowing in the White Clay Creek coming from a pipe he had traced to the Frezzo property. A letter dated October 4, 1971 from James to the DER, introduced as an exhibit by the Government, indicated that James knew that the holding tank was inadequate. One witness testified that at a visit to the Frezzo property on January 12, 1978, he was given a tour of the premises by James and Guido, who

indicated their control and ownership of the premises. including the holding tank; they also told him that they had constructed the storm runoff system. This witness made an in court identification of both James and Guido. In addition, there was testimony that on May 9, 1978 James made the statement that "we can control our waters 95% of the time." [2] Finally, there was testimony that the Frezzo property was listed at the tax assessor's office in the Chester County Courthouse as belonging to the corporation.

The Government's case was strong, and there can be no doubt that the evidence was sufficient to support the jury's verdict as to each of the defendants and as to each of the six counts of the indictment. The evidence amply supports a finding by the jury that each of the defendants discharged pollutants willfully or negligently, that James and Guido were owners or corporate officers of Frezzo Bros., and that Frezzo Bros. owned the property and controlled the compost operation. We therefore reject the defendants' contention that the evidence produced at trial was insufficient to support the verdict of the jury.

II. *Motion for a New Trial.*

Defendants claim the following errors in support of their motion for a new trial:

(A) That the Court erred when it failed to strike the opinion offered by Richard Casson to the effect that the condition or pollution of the stream at the Ellicott Avenue Bridge was caused by the discharge from the Frezzo property;

2. The Court instructed the jury that the contents of the October 4, 1971 letter and this statement should be used as evidence only against James and not against Guido or Frezzo Bros. The defendants challenge the admissibility against Guido and Frezzo Bros. of the letter and this statement. See our discussion at page 271-272, *infra*.

(B) That the Court erred when it overruled the defendants' objections to the statement made by James on May 9, 1978 and to the reading of Government exhibit No. 41;

(C) That the Court erred when it failed to give defendants' point for charge No. 5 that the mere discharge of a pollutant is not a criminal offense;[3]

(D) That the Court erred when it advised the jury that the individual defendants could be found guilty outside their capacity as alleged co-owners and responsible officers of the corporation; and

(E) That the Court erred when it denied the defendants' motion to suppress samples taken from the channel box.

A. *The Opinion of Richard Casson.*

[5] In connection with the defendants' contention that the opinion offered by Mr. Casson that the condition or pollution of the stream of the East Branch of the White Clay Creek at the Ellicott Avenue Bridge was caused by the discharge from the Frezzo property should have been stricken for lack of a factual basis, we find that our ruling at trial was correct. Mr. Casson testified that he had on several occasions observed the flow of the discharge from the Frezzo property to the Ellicott Avenue Bridge. In addition, he testified that a comparison of the results of the analyses of samples from the channel box and samples from the White Clay Creek substantiated his conclusion. Thus, we find that there was a sufficient factual basis for

3. We note that the defendants' requested point for charge refered to is actually point for charge No. 6, rather than point for charge No. 5: "The mere happening of a discharge is not sufficient to show the discharge was intentional or negligent."

Mr. Casson's opinion. See *United States v. R. J. Reynolds Tobacco Co.*, 416 F. Supp. 313 (D.N.J.1976).

B. *Statement and Letter of James.*

[6] The defendants, Guido and Frezzo Bros., contend that the Court erred in admitting into evidence a statement made by James on May 9, 1978 and the contents of a letter written by James to the DER on October 4, 1971, despite the Court's instruction to the jury that the letter and the statement were admissible only as to James. Neither the statement made by James nor the pertinent contents of the letter fall within the *Bruton* rule, as defendants contend. *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L.Ed.2d 476 (1968).[4] In *Bruton*, the Supreme Court held that the admission of a co-defendant's confession implicating the defendant was a violation of the defendant's right to cross-examine witnesses against him, even if it was admitted with a cautionary instruction to the jury that the statement was only to be considered as evidence against the co-defendant. But implicit within this ruling was the

4. The May 9, 1978 statement by James, "We can control our waters 95% of the time," and his letter of October 4, 1971, wherein he stated "I planned on an additional tank for water storage. This would help me better contain run-off and rainwater.... I am still considering the installation of another holding tank," which letter he signed "James Frezzo, Partner," clearly indicate, in light of other evidence presented in the case, that these statements were made by James in his capacity as co-owner and/or corporate officer of Frezzo Bros. and would probably be admissible against Frezzo Bros. Furthermore, since declarations of one partner in crime are admissible against his confederates where, as here, they were made in furtherance of a joint criminal venture and there is sufficient evidence independent of these statements to indicate the existence of such a venture, such statements probably would have been admissible against Guido and perhaps the corporation. *United States v. Trowery*, 542 F.2d 623, 627 (3d Cir. 1976); *United States v. Pugliese*, 153 F.2d 497, 500 (2d Cir. 1945). In an abundance of caution, however, at the request of the defendants the Court instructed the jury to consider the statements only against James.

rationale that the statement represent a "powerfully incriminating extrajudicial statement" which was highly damaging to the defendant and which was of critical, or at least substantial, weight to the Government's case. 391 U.S. at 128, 135-38, 88 S. Ct. 1620; *United States v. Munford*, 431 F. Supp. 278, 291 (E.D.Pa.1978). In light of the other evidence against defendants Guido and Frezzo Bros., we find that the statements involved here were not powerfully incriminating, highly damaging to these defendants, or of substantial weight to the Government's case against these defendants. Thus, we find that our rulings with respect to the May 9, 1978 statement of James and the letter from James to the DER were correct.

C. *Point for Charge No. 5.*

Defendants' contention (C), that the Court failed to charge the jury that the mere discharge of a pollutant is not a crime, is without merit because the Court in fact specifically charged the jury as follows:

> In connection with the second element, therefore, the burden is on the Government to prove beyond a reasonable doubt that the defendants' discharge of the pollutant was done willfully or negligently and the mere discharge of the pollutant, without proof that it was done either willfully or negligently, does not satisfy the Government's burden of proof beyond a reasonable doubt that the discharge was done willfully or negligently.

D. *Charge of Court Concerning Individual Defendants.*

[7] The individual defendants contend that the Court erred in its charge to the jury concerning them. They point to the indictment which charges that James, "an individual in his capacity as co-owner and Secretary of Frezzo Brothers, Inc." violated Sections 301(a) and 309(c) of the

Act and that Guido, "an individual in his capacity as co-owner and President of Frezzo Brothers, Inc." violated Sections 301(a) and 309(c) of the Act, and they claim that the Court erred in omitting this language in its charge to the jury concerning the individual defendants.

The statute creates an offense, the gravamen of which is the willful or negligent discharge of a pollutant by any person without a permit. It does not create a separate offense for such a discharge by a person in his capacity as a co-owner or an officer of a corporation or in any other capacity.[5] In the Court's charge, the jury was instructed that the Government had a burden to prove beyond a reasonable doubt all of the essential elements of the crime as to each defendant.[6] The charge stated that the essen-

5. The Act defines "person" as follows:

> The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body. 33 U.S.C. §1362(5)(1970 ed. Supp. IV).

The Act also provides that for purposes of section 309(c), "the term 'person' shall mean, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer." 33 U.S.C. §1319(c) (1970 ed. Supp. IV). The Court charged the jury concerning the meaning of the phrase "responsible corporate officer."

6. The Court charged the jury as follows:

> Now, the essential elements that must be found beyond a reasonable doubt before you may find a defendant guilty of violating those sections—in other words, Title 33, Section 1311(a) and 1319(c)—are that on or about the dates alleged in the indictment—and I have read those dates to you, and you will have it with you out there.
>
> These are the elements:
>
> Number 1. That the defendant discharged a pollutant;
>
> Number 2. That the defendant's discharge of the pollutant was done willfully or negligently;
>
> Third. That the defendant did not have a permit to discharge the pollutant.

tial elements of the crime consisted of the willful or negligent discharge of a pollutant without a permit. Inasmuch as the capacity in which one discharges the pollutant is not an essential element of the crime, the language of the indictment alleging that James and Guido each acted in his capacity as co-owner and/or Secretary and President of Frezzo Bros. goes beyond alleging matters which are essential elements of the crime. Language in an indictment which goes beyond alleging matters which are essential elements of the crime charged is surplusage and need not be proved. *United States v. Greene*, 497 F.2d 1068, 1086 (7th Cir. 1974), *cert. denied*, 420 U.S. 909, 95 S. Ct. 829, 42 L.Ed.2d 839 (1975); *United States v. Goodwin*, 440 F.2d 1152, 1157 (3d Cir. 1971). It therefore follows that the language concerning the capacity in which James and Guido committed the crime is surplusage and need not be proved, and the jury need not have been so charged.

In their memorandum of law in support of their motion for a new trial, the defendants allege a fatal variance between the indictment and the Court's charge. The Court finds no basis for such a contention. Defendants rely on *United States v. Smolar*, 557 F.2d 13 (1st Cir.), *cert. denied*, 434 U.S. 971, 98 S. Ct. 523, 54 L.Ed.2d 461 (1977), which held that the Court may not in its instruction change the charging part of an indictment "to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes." *Id.* at 19 (quoting *Stirone v. United States*, 361 U.S. 212, 216, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960)). The fact that the charge did not mention co-owners and officers of Frezzo Bros. did not in any way change the charging part of the indictment as discussed in *Smolar*. The indictment was read to the jury and it went out with the jury during its deliberations. Furthermore, all of the evidence presented by the Government concern-

ing James and Guido pointed to the fact that they were in control of the operation of Frezzo Bros. We are, therefore, unable to find any error in the charge.

E. *Motion to Suppress.*

[8] Defendants contend that the Court should have ordered the suppression of all of the samples taken from the channel box on the west side of Penn Green Road, which channel box was not located on the Frezzo property. At the suppression hearing, however, there was no evidence presented that the defendants were on the premises at the time of the seizure of the samples, that the defendants had a legitimate proprietary or possessory interest in the premises or that the defendants were charged with an offense that includes as an essential element of the offense possession of the samples seized. *Brown v. United States*, 411 U.S. 223, 230, 93 S. Ct. 1565, 36 L.Ed. 2d 208 (1973). Thus, the defendants lacked standing to object to the seizure of the samples taken from the channel box, and we correctly denied their pretrial motion to suppress.

While we do not herein discuss all the contentions of alleged error raised by the defendants, we have considered each and every allegation of error and hold that none of them, singly or collectively, is of sufficent substance to merit any further discussion as a basis for granting a judgment of acquittal or a new trial in this case.

Accordingly, an Order will be entered denying the defendants' motions for judgment of acquittal and a new trial.

APPENDIX B

COURT OF APPEALS DECISION

UNITED STATES COURT OF APPEALS

Third Circuit

Nos. 78-2670 to 78-2675.

UNITED STATES of America,

Appellee,

vs.

FREZZO BROTHERS, INC., Guido Frezzo, and James L. Frezzo,

Appellants.

Argued June 7, 1979.
Decided July 13, 1979.

Defendants were convicted in the United States District Court for the Eastern District of Pennsylvania, Raymond J. Broderick, J., of willfully or negligently discharging pollutants into navigable water of the United States without a permit, and they appealed. The Court of Appeals, Rosenn, Circuit Judge, held that: (1) there were no civil prerequisites to government's maintenance of criminal proceedings under the Act; (2) there was no requirement that Environmental Protection Agency promulgate effluent standards applicable to compost-manufacturing business prior to prosecution; and, (3) evidence supported convictions.

Affirmed.

1. Navigable Waters—35

There are no civil prerequisites to government's maintenance of criminal proceedings under the Federal Water Pollution Control Act. Federal Water Pollution Control Act Amendments of 1972, §309(c), 33 U.S.C.A. §1319(c).

2. Navigable Waters—35

There is no requirement that defendants be shown to have not complied with existing effluent limitations under the Federal Water Pollution Control Act before violation of section prohibiting willfully or negligently discharging pollutants into navigable water of the United States without a permit. Federal Water Pollution Control Act Amendments of 1972, §301(a), 33 U.S.C.A. §1311(a).

3. Navigable Waters—35

Promulgation of effluent limitations standards is not a prerequisite to maintenance of criminal proceeding based on violation of section of the Federal Water Pollution Control Act Amendments of 1972 prohibiting willful or negligent discharge of pollutants into navigable waters of the United States without a permit. Federal Water Pollution Control Act Amendments of 1972, §301(a), 33 U.S.C.A. §1311(a).

4. Navigable Waters—35

Evidence, in prosecution for willful or negligent discharge of pollutants into navigable water of the United States without a permit, was sufficient to support convictions. Federal Water Pollution Control Act Amendments of 1972, §§101-517, 301(a), 309(c), 33 U.S.C.A. §§1251-1376, 1311(a), 1319(c).

5. Criminal Law—870

Special verdicts are generally disfavored in criminal cases.

6. Criminal Law—798½

Where evidence was sufficient to sustain each count of willful or negligent discharge of pollutants into navigable water of United States without a permit on theory of willful discharge on counts one through four and on theory of negligent discharge under counts five and six, there was no compelling necessity for special verdict, particularly in light of fact that there is no variance in statutory penalty between willful and negligent violations and, therefore, trial judge did not abuse discretion in declining to submit special verdict. Federal Water Pollution Control Act Amendments of 1972, §§101-517, 301(a), 309(c), 33 U.S.C.A. §§1251-1376, 1311(a), 1319(c).

William J. Gallagher (argued), Randy L. Sebastian, MacElree, Harvey, Gallagher & Kean, Ltd., West Chester, Pa., for appellants.

Peter F. Vaira, U.S. Atty., Walter S. Batty, Jr., Asst. U.S. Atty., Chief, App. Div., Bruce J. Chasan (argued), Asst. U.S. Atty., Philadelphia, Pa., for appellee.

Before ADAMS and ROSENN, Circuit Judges, and LACEY, District Judge.*

OPINION OF THE COURT

ROSENN, Circuit Judge.

Since the enactment in 1948 of the Federal Water Pollution Control Act, 62 Stat. 1155 ("the Act"), the Government has, until recent years, generally enforced its provi-

*Honorable Frederick B. Lacey, United States District Judge for the District of New Jersey, sitting by designation.

sions to control water pollution through the application of civil restraints.[1] In this case, however, the Government in the first instance has sought enforcement of the Act as amended in 1972, 33 U.S.C.A. §§1251-1376 (Supp. 1973), against an alleged corporate offender and its officers by criminal sanctions. Whether the Government may pursue the criminal remedies under the Act before instituting a civil action or before giving written notice of the alleged violation is the principal issue presented in this appeal.

The appellants were convicted by a jury on six counts of willfully or negligently discharging pollutants into a navigable water of the United States without a permit, in violation of 33 U.S.C. §§1311(a), 1319(c). The corporate defendant, Frezzo Brothers, Inc., was fined $50,000, and the individual defendants, Guido and James Frezzo received jail sentences of thirty days each and fines aggregating $50,000. The Frezzos appeal from the trial court's final judgment of sentence. We affirm.

I.

Frezzo Brothers, Inc., is a Pennsylvania corporation engaged in the mushroom farming business near Avondale, Pennsylvania. The business is family operated with Guido and James Frezzo serving as the principal corporate officers. As a part of the mushroom farming business, Frezzo Brothers, Inc., produces compost to provide a growing

1. In a comprehensive analysis made in 1973 of the use of criminal sanctions under the Federal Water Pollution Act, Michael K. Glenn, former deputy assistant administrator for federal water enforcement, pointed out that: "[D]uring the past 25 years the federal government has relied almost exclusively on negotiation, public pressure, and voluntary compliance by dischargers as the principal means of achieving compliance with federal water pollution control laws." Glen, *The Crime of "Pollution": The Role of Federal Water Pollution Criminal Sanctions*, 11 Am.Crim.L.Rev. 835, 836 (1973) (footnote omitted).

base for the mushrooms. The compost is comprised mainly of hay and horse manure mixed with water and allowed to ferment outside on wharves.

The Frezzo's farm had a 114,000 gallon concrete holding tank designed to contain water run-off from the compost wharves and to recycle water back to them. The farm had a separate storm water run-off system that carried rain water through a pipe to a channel box located on an adjoining property owned by another mushroom farm. The channel box was connected by a pipe with an unnamed tributary of the East Branch of the White Clay Creek. The waters of the tributary flowed directly into the Creek.

Counts One through Four of the indictment charged the defendants with discharging pollutants into the East Branch of the White Clay Creek on July 7, July 20, September 20, and September 26, 1977. On these dates Richard Casson, a Chester County Health Department investigator, observed pollution in the tributary flowing into the Creek and collected samples of wastes flowing into the channel box. The wastes had the distinctive characteristics of manure and quantitative analysis of the samples revealed a concentration of pollutants in the water. The Government introduced meteorological evidence at trial showing that no rain had been recorded in the area on these four dates. Based on this evidence, the Government contended that the Frezzos had willfully discharged manure into the storm water run-off system that flowed into the channel box and into the stream.

Investigator Casson returned to the Frezzo farm on January 12, 1978, to inspect their existing water pollution abatement facilities. Guido and James Frezzo showed Casson both the holding tank designed to contain the waste water from the compost wharves, and the separate storm water run-off system. Casson returned to the farm on May 9,

1978 with a search warrant and several witnesses. This visit occurred after a morning rain had ended. The witnesses observed the holding tank overflowing into the storm water run-off system. The path of the wastes from the Frezzo holding tank to the channel box and into the stream was photographed. James Frezzo was present at the time and admitted to Casson that the holding tank could control the water only 95% of the time. Samples were again collected, subjected to quantitative analysis and a high concentration of pollutants was found to be present. This incident gave rise to Count Five of the indictment.

Additional samples were collected from the channel box on May 14, 1978, after a heavy rain. Again, a concentration of pollutants was found to be present. This evidence served as the basis for Count Six of the indictment. At trial, the Government introduced evidence of the rainfall on May 9 and May 12 along with expert hydrologic testimony regarding the holding capabilities of the Frezzo's tank. The Government theorized that the holding tank was too small to contain the compost wastes after a rainstorm and that the Frezzos had negligently discharged pollutants into the stream on the two dates in May.

The jury returned guilty verdicts on all six counts against the corporate defendant, Frezzo Brothers, Inc., and individual defendants, Guido and James Frezzo. The trial court denied the defendants' motions for judgment of acquittal and new trial in a memorandum opinion, *United States v. Frezzo Brothers, Inc.*, 461 F. Supp. 266 (E.D.Pa. 1978).

II.

[1] The Frezzos first argue that the Administrator of the Environmental Protection Agency must either give

them some notice of alleged violations of the Federal Water Pollution Control Act, or institute a civil action before pursuing criminal remedies under the Act, Judge Broderick, the trial judge, rejected this argument, 461 F. Supp. at 268, relying primarily on *United States v. Phelps Dodge*, 391 F. Supp. 1181 (D. Ariz. 1975), which held that there were no civil prerequisites to the Government's maintenance of criminal proceedings under the Act. We agree.

The enforcement provisions of the Act are contained in 33 U.S.C. §1319. The criminal provision of the Act, §1319(c) provides in relevant part:

> (1) Any person who willfully or negligently violates section 1311 . . . of this title . . . shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. . . .

This provision is preceded by §1319(a) dealing with state enforcement and compliance orders, and §1319(b) governing civil actions. There is conflicting legislative history with respect to whether a compliance order or a civil suit by the Administrator should be a prerequisite to the Government's institution of criminal proceedings under §1319(c).[2] The district court in *Phelps Dodge*, however, relied on the final House Committee Report which clearly indicated that written notice of the violation, administrative, civil or criminal remedies under the Act were to be *al-*

2. Senator Muskie expressed the view in the Senate's consideration of the Conference Committee Report that an abatement order or civil action was mandatory under the Act. A Legislative History of the Federal Water Pollution Control Act Amendments of 1972, U.S. Government Printing Office, at 174. A similar view was espoused by Representative Harsha in the House during debate on the House Bill. *Legislative History, supra* at 530.

ternative remedies. The key portion of the House Committee Report provides:

> Whenever on the basis of any information available to him the Administrator finds that anyone is in violation of any of these requirements, he *may* take *any* of the following enforcement actions: (1) he shall issue an order requiring compliance; (2) he shall notify the person in alleged violation in such state of such finding . . . or (3) he shall bring a civil action; or (4) he shall cause to be instituted criminal proceedings.

Legislative History, supra at 801-02 (emphasis supplied). This statement led the court in *Phelps Dodge* to conclude that the Administrator "is not required to proceed first to effect a correction by civil means before instituting criminal proceedings." 391 F. Supp. at 1184. An identical result was reached by the court in *U.S. v. Hudson Farms, Inc.*, 12 E.R.C. 1144, 1146 (E.D.Pa. 1978).[3]

We believe that these cases place a correct gloss on the enforcement provisions of the Act.[4] There is nothing in the text of §1319(c) that compels the conclusion that prior written notice, other administrative or civil remedies are prerequisite to criminal proceedings under the Act. The Senate acceded to the House in not making civil enforcement mandatory upon the Administrator under section 1319. *Legislative History, supra* at 174. Hence, we can only conclude that whatever support existed for the position urged by the Frezzos did not prevail in the enactment of the final Bill.

3. This case was decided after the district court's decision in the present case and hence was not considered by the court reaching its decision.

4. For a general review of the 1972 amendments *see* Comment, *The Federal Water Pollution Control Act Amendments of 1972*, 1973 Wis. L. Rev. 893 (1973).

Further, we see no reason why the Government should be hampered by prerequisites to seeking criminal sanctions under the Act. The Frezzos urge that it can only be through prior notification, followed by continued polluting in the face of such notice, that willful violations of the Act can be established. We find this argument unconvincing. Although continued discharges after notification could be one way for the Government to prove scienter, it is certainly not the only way to establish willful violations. The Government could logically argue, as it did in this case, that the circumstances surrounding the alleged discharges manifested willful violations of the Act and that it had the power to pursue criminal rather than civil sanctions. Furthermore, in view of the broad responsibilities imposed upon the Administrator of the EPA, he should be entitled to exercise his sound discretion as to whether the facts of a particular case warrant civil or criminal sanctions.[5] We therefore hold that the Administrator of the EPA is not required to pursue administrative or civil remedies, or give notice, before invoking criminal sanctions under the Act.

III.

[2] The Frezzos next contend that the indictment should have been dismissed because the EPA had not pro-

5. There is evidence in the Legislative History of the 1972 Amendments to the Act that the new criminal sanctions were designed to strengthen the ability of the Government to pursue criminal remedies for water pollution. *See Legislative History, supra* at 216-17, 663, 1481-82. Further, Glenn indicates that: "One of the prevalent feelings of the Congress during consideration of the enforcement aspects of the 1972 Amendments was that the enforcement mechanism of the previous law [Rivers and Harbors Act of 1899, commonly known as the Refuse Act] did not allow (or require) prompt enforcement action." Glenn, *supra* note 2, at 866 n. 140. Thus, it is evident that prerequisites to the pursuit of criminal sanctions under the Act would be inconsistent with Congress' desire for a stronger enforcement mechanism.

mulgated any effluent standards applicable to the compost manufacturing business. The Frezzos argue that before a violation of §1311(a) can occur, the defendants must be shown to have not complied with existing effluent limitations under the Act. The district court disagreed, finding no such requirement. 461 F. Supp. at 268-69. We agree with the district court.

The core provision of the Act is found in §1311(a) which reads:

> Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutants by any person shall be unlawful.

Section 1311(b) then sets out a timetable for the promulgation of effluent limitations for point sources and section 1312 provides for the establishment of water quality related effluent limitations. The Frezzos contend that they cannot have violated the Act because the EPA has not yet promulgated effluent limitations which they can be held to have violated. Appellants rely primarily on *United States v. GAF Corporation*, 389 F. Supp. 1379 (S.D. Texas 1975) as support for their position. That case did hold that before an abatement order may be issued pursuant to §1319(a)(3) of the Act, the defendants must be shown to have violated an applicable effluent limitation. 389 F. Supp. at 1385-86. The Government argues, however, that the decision is incorrect and cites *American Frozen Food Institute v. Train*, 176 U.S. App. D.C. 105, 113, 539 F.2d 107, 115 (1976) for the proposition that:

> By 1972 Congress determined upon wholly a new approach. The basic concept of the Act [section 1311(a)] we construe in this case is an ultimate flat prohibition upon all discharges of pollutants. . . .

Indeed, the court specifically noted that "[t]his prohibition which is central to the entire Act is statutory and requires no promulgation." *Id.*, 176 U.S. App. D.C. at 126, 539 F.2d at 128.

The Sixth Circuit has enforced criminal penalties for violation of section 1311(a). In *United States v. Hamel*, 551 F.2d 107, 109 (6th Cir. 1977), the court stated: "The negligent or wilful violation of §1311(a), however, without justification subjects one to the criminal sanctions [sic] §1319(c)(1)." The Government contends in the instant case that the lack of effluent limitations is no defense to a violation of section 1311 (a). In *United States v. Hamel*, limitations have been established for a particular business, the proper procedure is for the business to apply for a permit to discharge pollutants under 33 U.S.C. §1342(a), which allows the Administrator to establish interim operating conditions pending approval.[6] The district court in *GAF* explicitly rejected this argument as placing too harsh a burden on the defendant because it viewed the Act as not allowing any discharge pending approval of the permit. 389 F. Supp. at 1386. The Government contends in the present case, however, that the absence of effluent limitations should not be allowed to nullify the flat prohibition on discharges under §1311(a). We agree.

The *GAF* court appropriately recognized that the legislative history of the Act was "curiously incomplete" on the

6. 33 U.S.C. §1342(a)(1) provides in relevant part:

> [T]he Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet all applicable requirements . . . , or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

issue in question. *Id.* We therefore must interpret the statute in a fashion that best effectuates the policies of the Act. The basic policy of the Act is to halt uncontrolled discharges of pollutants into the waters of the United States. 33 U.S.C. §1251. In fact, the Act sets forth "the national goal that the discharge of [all] pollutants into the navigable waters be eliminated by 1985." *Id.* §1251(a)(1); *United States v. Hamel, supra* at 109. We see nothing impermissible with allowing the Government to enforce the Act by invoking §1311(a), even if no effluent limitations have been promulgated for the particular business charged with polluting. Without this flexibility, numerous industries not yet considered as serious threats to the environment may escape administrative, civil, or criminal sanctions merely because the EPA has not established effluent limitations. Thus, dangerous pollutants could be continually injected into the water solely because the administrative process has not yet had the opportunity to fix specific effluent limitations. Such a result would be inconsistent with the policy of the Act.

We do not believe, as did the court in *GAF*, that the permit procedure urged by the Government is unduly burdensome on business. If no effluent limitations have yet been applied to an industry, a potential transgressor should apply for a permit to discharge pollutants under section 1342(a). The Administrator may then set up operating conditions until permanent effluent limitations are promulgated by EPA. The pendency of a permit application, in appropriate cases, should shield the applicant from liability for discharge in the absence of a permit. 33 U.S.C. §1342(k). *See Stream Pollution Con. Bd. of Ind. v. U.S. Steel Corp.*, 512 F.2d 1036, 1041 n. 12 (7th Cir. 1975). EPA cannot be expected to have anticipated every form of water pollution through the establishment

of effluent limitations. The permit procedure, coupled with broad enforcement under §1311(a) may, in fact, allow EPA to discover new sources of pollution for which permanent effluent standards are appropriate.

[3] In the present case, it is undisputed that there was no pending permit to discharge pollutants; nor had Frezzo Brothers, Inc., ever applied for one. This case, therefore, appears to be particularly compelling for broad enforcement under sections 1311(a), 1319(c)(1). The Frezzos, under their interpretation of the statute, could conceivably have continued polluting until EPA promulgated effluent limitations for the compost operation. The Government's intervention by way of criminal indictments brought to a halt potentially serious damage to the stream in question, and has no doubt alerted EPA to pollution problems posed by compost production. We therefore hold that the promulgation of effluent limitation standards is not a prerequisite to the maintenance of a criminal proceeding based on violation of section 1311(a) of the Act.

IV.

[4] The Frezzos next contend that there was insufficient evidence to convict them of the charges in the indictment. They virtually concede that the Government presented sufficient evidence to sustain Count Five. However, defendants charge that the Government, *inter alia*,[7] had failed to prove willful or negligent discharges of pollutants. We disagree because we are persuaded that substantial evi-

7. The defendants also argued that the Government failed to produce sufficient evidence to identify them as the parties responsible for the discharges. We believe the district court correctly concluded, 461 F. Supp. at 270-71, that sufficient evidence of identification was produced at trial.

dence in the record supports all six counts of the indictment.[8]

The Government contended at trial that the discharges giving rise to Counts One through Four of the indictment were willful. To establish this claim, the Government relied on the samples collected on those four occasions, the absence of rain on the dates in question, and the elimination of other possible causes for the pollution. The Frezzos maintain that the Government on this evidence failed to establish a willful act. We disagree. The jury was entitled to infer from the totality of the circumstances surrounding the discharges that a willful act precipitated them. The Government did not have to present evidence of someone turning on a valve or diverting wastes in order to establish a willful violation of the Act.[9]

The Government's theory on Counts Five and Six was that the discharges were negligently caused by the inadequate capacity of the holding tank. Count Five was amply supported by eyewitness testimony, samples of the pollutants, evidence of rainfall and expert hydrologic evidence of the holding tank's capacity. Count Six was similarly supported by evidence of rainfall, samples, expert

8. Judge Broderick stated in denying the defendants' motions for acquittal and a new trial:

> The Government's case was strong, and there can be no doubt that the evidence was sufficient to support the jury's verdict as to each of the defendants and as to each of the six counts of the indictment.

461 F. Supp. at 270.

9. Judge Broderick noted:

> Testimony was presented by several witnesses that on many occasions, commencing as far back as 1970, the defendants in this case had been investigated, visited and confronted by a number of state and county employees concerning the fact that the stream in question was being polluted by runoff from the compost operation conducted by the defendants on the Frezzo property.

461 F. Supp. at 270.

testimony and photographs of the holding tank three days before the incident, showing it to be near capacity. The jury could properly have concluded that the water pollution abatement facilities were negligently maintained by the Frezzos and were insufficient to prevent discharges of the wastes. We therefore conclude that there was sufficient evidence to sustain the verdict on all six counts.

V.

Defense counsel requested at trial that a special verdict be submitted to the jury in order to determine, if a guilty verdict were returned, whether the jury found the defendants guilty of a willful or a negligent violation under each count. The trial judge denied the request. The Frezzos maintain that this denial constitutes reversible error. We cannot agree.

[5] We start with the proposition that special verdicts are generally disfavored in criminal cases. *United States v. Munz*, 542 F.2d 1382, 1389 (10th Cir. 1976), cert. *denied*, 429 U.S. 1104, 97 S. Ct. 1133, 51 L.Ed.2d (1977); *United States v. Jackson*, 542 F.2d 403, 412 (7th Cir. 1976). There is the belief that in the long run special verdicts are not favorable to defendants because "[b]y a progression of questions each of which seems to require an answer unfavorable to the defendant, a reluctant juror may be led to vote for a conviction which, in the large, he would have resisted." *United States v. Spock*, 416 F.2d 165, 182 (2d Cir. 1969). *See United States v. McCracken*, 488 F.2d 406, 419 (5th Cir. 1974).

[6] The defendants maintain nevertheless, that it was important for the court to know whether the discharges were found to be willful or negligent under each Count, in order to assess the sufficiency of the evidence and for sentencing purposes. The Government, however, pro-

ceeded on a theory of willful discharge under Counts One through Four and on a theory of negligent discharge under Counts Five and Six. We have already noted our agreement with the district court's conclusion that the evidence was sufficient to sustain each of the counts on those theories. Hence, although a special verdict might have been illuminating, there was no compelling necessity for one in this case. Further, there is no variance in the statutory penalty between willful and negligent violations. It therefore would have been within the judge's discretion to sentence the defendants to the statutory maximum had the jury returned a special verdict finding the defendants guilty of negligent violations only. Indeed, it appears that the judge might have done so since he sentenced the defendants more severely under the negligent counts.[10] We therefore conclude that the trial judge did not abuse his discretion in declining to submit a special verdict in the instant case.

Appellants raise other contentions on appeal all of which are without merit.[11] We perceive no prejudice to the de-

10. The jail sentences were imposed only for Count Five and the defendants were more heavily fined under Counts Five and Six.

11. Defendants contend that the trial judge improperly instructed the jury that they could be found guilty as individuals when the indictment charged them with acting as corporate officers. The Government argued the case on the "responsible corporate officer doctrine" recognized by the United States Supreme Court in *United States v. Park*, 421 U.S. 658, 95 S. Ct. 1903, 44 L.Ed.2d 489 (1974) and *United States v. Dotterweich*, 320 U.S. 277, 64 S. Ct. 134, 88 L.Ed. 48 (1943). We have examined the judge's charge and we perceive no error in the instruction to the jury on this theory.

Defendants also contend that the district court erred in failing to suppress the samples from the channel box because they were taken without a search warrant. However, the channel box lay on property not owned by the Frezzos. The district court held that because defendants had no legitimate proprietary or possessory interest in the neighboring property and because possession was not an element of the offense charged, they lacked standing under the fourth amendment to contest the seizure of the samples. The United States Supreme Court, however, in *Rakas v. Illinois*, 439 U.S. 128, 138-139, 99 S. Ct. 421, 58 L.Ed.2d 387 (1978), dropped the issue of standing from consideration in fourth amendment cases in favor of an inquiry into the extent of an individual defendant's rights under the fourth amendment. Nevertheless, it is still clear under *Alderman v. United States*, 394 U.S. 165, 89 S. Ct. 961, 22 L.Ed.2d 176 (1969) that fourth amendment rights are personal and cannot be vicariously asserted. We agree that defendants had no proprietary or possessory interest in the searched premises nor was possession an element of the offense. Hence, there are no personal rights that may be substantively asserted under the fourth amendment. *Rakas, supra*, 439 U.S. at 140-141, 99 S. Ct. 421.

fendants meriting reversal of the verdict and the grant of a new trial. Accordingly, the judgment of the district court will be affirmed.

APPENDIX C

ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 78-2670/1/2/3/4/5

UNITED STATES OF AMERICA,

vs.

FREZZO BROTHERS, INC.
Guido Frezzo, James Frezzo,
and Frezzo Brothers, Inc.,

Appellants.

SUR PETITION FOR REHEARING

Present: ADAMS and ROSENN, Circuit Judges, and
LACEY, District Judge*

The petition for rehearing filed by
appellants

in the above entitled case having been submitted to the judges who participated in the decision of this court and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is denied.

By the Court,

/s/ Max Rosenn
MAX ROSENN
Judge

Dated: October 22, 1979

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* Sitting by designation.

Supreme Court, U. S.
FILED
FEB 2 1980
MICHAEL RODAK, JR., CLERK

No. 79-808

In the Supreme Court of the United States

OCTOBER TERM, 1979

FREZZO BROTHERS, INC., GUIDO FREZZO AND JAMES FREZZO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 17a-33a) is reported at 602 F. 2d 1123. The opinion of the district court (Pet. App. 1a-16a) is reported at 461 F. Supp. 266.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1979. A petition for rehearing (Pet. App. 34a) was denied on October 22, 1979. The petition for a writ of certiorari was filed on November 21, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

1. Whether the Administrator of the Environmental Protection Agency must issue a compliance order or bring a civil enforcement action prior to the institution of criminal proceedings under Section 309(c)(1) of the Water Act of 1972, 33 U.S.C. 1319(c)(1).

2. Whether a criminal prosecution under Section 309(c)(1) can be initiated if the Administrator has not issued effluent limitations under Section 301 of the Water Act, 33 U.S.C. 1311.

STATUTE INVOLVED

The pertinent provisions of the Federal Water Pollution Control Act Amendments of 1972,[1] 33 U.S.C. 1251 *et seq.*, are as follows:

Section 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law.

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

Section 1319. Enforcement

(a) State enforcement; compliance orders

(1) * * *

(2) * * *

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, or 1318 of this title, or is in violation of any permit condition or limitation implementing any

[1]Hereinafter the "Water Act." The Water Act was further amended by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566.

of such sections in a permit issued under section 1342 of this title by him or by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(b) Civil actions

The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

(c) Criminal penalties

(1) Any person who willfully or negligently violates section 1311, 1312, 1316, 1317, or 1318 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under Section 1342 of this title by the Administrator or by a State, shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not

more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.

Section 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

STATEMENT

In a six-count indictment, petitioners James L. Frezzo, Guido Frezzo and Frezzo Brothers, Inc., were charged with willfully and negligently discharging pollutants—waste water from mushroom compost manufacturing operations—into the East Branch of the White Clay Creek, a navigable water of the United States, without having obtained a discharge permit, in violation of Sections 301(a) and 309(c) of the Water Act, 33 U.S.C. 1311(a) and 1319(c). A jury convicted petitioners on all six counts. The trial court imposed thirty day jail sentences and a total fine of $50,000 upon the individual defendants and a $50,000 fine upon the corporate defendant. In affirming the convictions the court of

appeals held: (1) "that the Administrator of the EPA is not required to pursue administrative or civil remedies, or give notice, before invoking criminal sanctions" (Pet. App. 25a); (2) "that the promulgation of effluent limitation standards is not a prerequisite to the maintenance of a criminal proceeding" (*id.* at 29a); (3) "that there was sufficient evidence to sustain the verdict on all six counts" (*id.* at 31a); and (4) "that the trial judge did not abuse his discretion in declining to submit a special verdict" (*id.* at 32a).

The operative facts may be summarized as follows. Petitioners are engaged in mushroom compost manufacturing and mushroom farming (*id.* at 7a, 20a). The convictions at issue stem from the former operation in which petitioners produce the medium used for growing mushrooms. The process involves periodically adding water to a mixture of hay and horse manure piled on a concrete wharf in the open air so that it will ferment (Pet. 6; Pet. App. 7a, 21a). Water is introduced to the mixture both by rain and snow and by a water circulation system (Pet. 6). Part of that system is a concrete holding tank that catches runoff from the composting wharf, and recycles it to the wharf (*ibid.*; Pet. App. 7a, 21a). Nearby is a wholly separate storm water runoff system leading from petitioners' farm to a channel box on adjoining property, and from there to an unnamed tributary of the East Branch of White Clay Creek (Pet. App. 7a, 21a). When petitioners' composting holding tank overflowed, polluted water would find its way to the separate storm water system and from there into the channel box and ultimately the stream (*id.* at 22a; see also *id.* at 8a).

On four occasions during 1977 and two during 1978, pollutant discharges traceable to the Frezzo compost holding tank were discovered in the White Clay Creek. These six discharges formed the basis for the indictment (*id.* at 21a-22a).

ARGUMENT

As framed by the petition, the question presented blends two discrete and settled issues: (1) whether a compliance order or civil action must precede criminal enforcement action under the Water Act, and (2) whether effluent limitations must be promulgated prior to commencement of criminal proceedings. The answer in each case is clear; petitioners point to no conflict among the circuits on either, and neither presents an important issue of federal law meriting resolution by this Court.

1. Petitioners submit (Pet. 7-9) that before a criminal action under 33 U.S.C. 1319(c) can be brought, the EPA Administrator must issue a compliance order or bring a civil action under 33 U.S.C. 1319(a)(3) and 1319(b). The court of appeals correctly rejected this claim for which petitioners marshal no legal support.

The language of the statute does not justify the conclusion that criminal liability can arise only after warning by one of the noncriminal methods at the EPA Administrator's disposal. As the court of appeals noted, "[t]here is nothing in the text of §1319(c) that compels the conclusion that prior written notice, other administrative or civil remedies are prerequisite to criminal proceedings under [Section 1319]" (Pet. App. 24a). Although subsection (a)(3) provides that "[w]henever * * * the Administrator finds that any person is in violation of section 1311 * * * he shall issue an order

requiring such person to comply with such section * * * or he shall bring a civil action in accordance with subsection (b) * * *," these steps are not mandatory. See *Sierra Club* v. *Train*, 557 F. 2d 485, 490-491 (5th Cir. 1977). Moreover, whether they are mandatory or discretionary, nothing in the language or structure of Section 1319, or the Water Act as a whole, conditions the Administrator's authority to commence criminal proceedings under subsection (c) on his having taken the steps outlined in subsection (a) (3). Section 1319(c)(1) constitutes an independent enforcement mechanism. "Any person who wilfully or negligently violates section 1311 * * * shall be punished by a fine * * * or by imprisonment * * * or by both" (*ibid.*). The language could scarcely be clearer.

The legislative history reinforces this conclusion. As the court of appeals observed (Pet. App. 23a-24a) (footnote omitted):

> [T]he final House Committee Report * * * clearly indicate[s] that written notice of the violation, administrative, civil or criminal remedies under the Act were to be *alternative* remedies. The key portion of the House Committee Report provides:
>
> "Whenever on the basis of any information available to him the Administrator finds that anyone is in violation of any of these requirements, he *may* take *any* of the following enforcement actions: (1) he shall issue an order requiring compliance; (2) he shall notify the person in alleged violation in such state of such finding . . . or (3) he shall bring a civil action; or (4) he shall cause to be instituted criminal proceedings."

Legislative History, *supra* at 801-02 (emphasis supplied). This statement led the court in *Phelps Dodge* [391 F. Supp. 1181 (D. Ariz. 1975)] to conclude that the Administrator "is not required to proceed first to effect a correction by civil means before instituting criminal proceedings." 391 F. Supp. at 1184. An identical result was reached by the court in *U.S.* v. *Hudson Farms, Inc.*, 12 E.R.C. 1144, 1146 (E.D. Pa. 1978).

We believe that these cases place a correct gloss on the enforcement provisions of the Act. * * * The Senate acceded to the House in not making civil enforcement mandatory upon the Administrator under section 1319. *Legislative History*, *supra* at 174. Hence, we can only conclude that whatever support existed for the position urged by the Frezzos did not prevail in the enactment of the final Bill.

2. Nor is there any merit in petitioners' contention (Pet. 7-11) that the Administrator cannot initiate criminal proceedings under the Water Act unless and until applicable effluent limitations have been promulgated. Again, the text of the statute is clear. Section 1311(a)—characterized by the court of appeals as the "core provision of the Act" (Pet. App. 26a) and by the Sixth Circuit as the "broad primary declaration of the Act" (*United States* v. *Hamel*, 551 F. 2d 107, 109 (1977))—states: "Except as in compliance with this section and [other specified] sections * * * of this title, the discharge of any pollutant by any person shall be unlawful." Thus, the basic concept underlying the Water Act is a flat ban on pollutants, subject to limited exceptions.

Section 1311(b) provides for the promulgation of effluent limitations which take account of the limits of pollution control technology while assuring progress toward "the national goal of eliminating the discharge of all pollutants." Compliance with applicable limitations is one of the exceptions to the overall ban imposed by Section 1311(a). However, it does not follow that the *absence* of applicable limitations constitutes an exception as well. Rather, as the court of appeals concluded, "[i]f no effluent limitations have yet been applied to an industry, a potential transgressor should apply for a permit to discharge pollutants under section 1342(a). The Administrator may then set up operating conditions until permanent effluent limitations are promulgated by EPA" (Pet. App. 28a).[2] Absent a permit, if no limitations are in effect the primary ban of Section 1311(a) remains in force. Otherwise Section 1342(a), insofar as it expressly applies to the issuance of permits "prior to the taking of necessary implementing actions relating to" effluent limitations, would be rendered superfluous.

More importantly, the rule contended for by petitioners is incompatible with the purposes of the Water Act, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and to eliminate "the discharge of pollutants into the navigable waters by 1985" (33 U.S.C. 1251). As the court of appeals observed, the "EPA cannot be expected to

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[2]It is clear that Congress, recognizing that effluent limitations would not be promulgated immediately, intended that in the interim persons desiring to discharge pollutants first obtain permits under Section 1342. H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 100, 126 (1972); S. Rep. No. 92-414, 92d Cong., 1st Sess. 42 (1971). See also *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 133 n.24 (1977).

have anticipated every form of water pollution through the establishment of effluent limitations" (Pet. App. 28a-29a). To prohibit enforcement of the Act until such limitations have been promulgated would mean that "dangerous pollutants could be continually injected into the water solely because the administrative process has not yet had the opportunity to fix specific effluent limitations. Such a result would be inconsistent with the policy of the Act" (*id.* at 28a).[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1980

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[3]Petitioners suggest in passing (Pet. 10-11) that the decision below is infirm because the court of appeals did not consider whether their activities fall within an agricultural exception to Section 1342's permit requirements. See 40 C.F.R. 125.4. This contention was first raised in petitioners' out-of-time petition for rehearing which the court of appeals denied without opinion (Pet. App. 34a). Accordingly, the issue is not properly before this Court.